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The BAR ASSOCIATION BULLETIN

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OCTOBER 20, 1927

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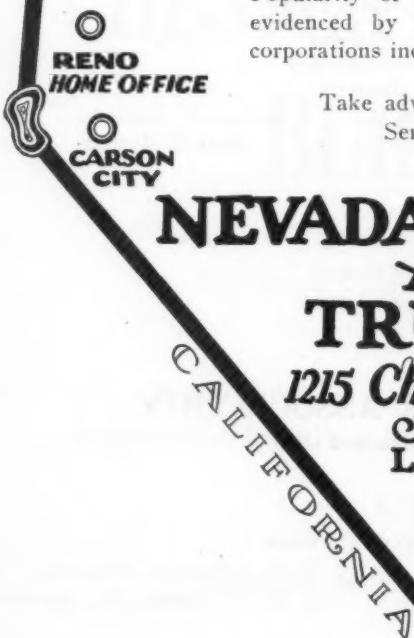
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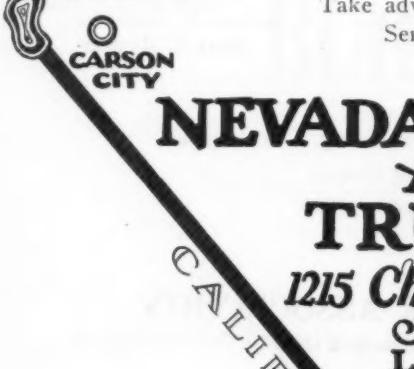
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The Community Property Problem*

By CHARLES H. BROCK, *Chief Counsel of the Title Insurance and Trust Company of Los Angeles*

The purpose of this paper is to consider, as briefly as possible, certain changes made by the legislature in the community property laws of California for the purpose of formulating substantive conclusions as to the meaning and legal effect of the same.

I refer to section 172a of the Civil Code adopted in 1917 and subsequent amendments thereto, the amendments of sections 1401 and 1402 of the Civil Code enacted in 1923, and, last but not least, Chaptered laws 487, 488 and 265 enacted in 1927.

Chaptered law 487 amends section 164 of the Civil Code so as to provide that, whenever real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property and that, if such real or personal property, or any interest therein or encumbrance thereon, is acquired by such married woman and her husband, or by her and any other person, the presumption is that she takes the part acquired by her as tenant in common unless a different intention is expressed in the instrument. The presumptions above mentioned in respect to real and personal property are conclusive in favor of a purchaser, encumbrancer, payor, or any other person dealing with such married woman in good faith and for a valuable consideration.

Chaptered law 488 amends section 172a of the Civil Code so as to expressly provide that a married woman may join with her husband, either personally or by duly authorized agent, in executing any instrument by which the community real property, or any interest therein, is leased for a longer period than one year, or is sold, conveyed or encumbered.

Chaptered law 265 adds a new section to the Civil Code of this state, to be known as section 161a. In my opinion, said new section constitutes a most radical change in the community property laws of this state. The section reads as follows:

"The respective interests of the husband and wife in community property during continuance of the marriage relation are PRESENT, EXISTING and EQUAL INTERESTS under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

The provisions of said chaptered laws became effective on the 29th day of July, 1927, and in my opinion, none of them will be held by the courts to have any application to community property acquired before said day.

In attempting to determine the meaning and legal effect of new statutory enactments relating to community property it is necessary to review briefly the origin and development of that law.

The law of the marital community seems to have originated among the early German tribes. It was first unwritten, but later codified, and then brought into Spain by the Goths in the seventh century. As far as history records, it was first enacted into code form by the Goths in what was known as the Code of Euric or Tolosa, some time between the years 466 and 484 A. D. It became the law of Mexico with the coming of the Spaniards in 1521 and the following years. The early pioneers in that part of the territory of Mexico, which is now known as the state of California, found the rules of community property as known to Spain and Mexico firmly established. After the treaty of Guadalupe Hidalgo and upon the establishment of the state of California, the people of this state, under the Constitution of 1849, by legislative act adopted the first community property law of the state.

Under the community property law of this state as enacted in 1850, the husband, during the existence of the marriage, was the sole owner of all community property,

*EDITOR'S NOTE: This is the fourth of a series of articles by representative experts discussing Amendments by the 1927 Legislature to the Codes of California.

both real and personal. He, and he alone, was the sole dominating power. He, and he alone, could sell, convey or encumber both community real and community personal property with one exception only: He could not dispose of community property for the sole purpose of defrauding his wife of that share which, under the law, vested in her upon his death. Furthermore, he could not dispose of the wife's half by will. The wife had no right, title or interest in or to community property, real or personal, during the existence of the marriage. Upon the dissolution of the community, either by death or by divorce, and then only, did she become vested with her interest. Such vested interest was an undivided one-half interest and, if the marriage was dissolved by the death of the husband, she took the same as heir of her husband and subject to administration in his estate.

The community property rights of the wife are based upon the theory that the wife contributes equally with her husband to the acquirement of all community property.

The community property law of this state adopted in 1850 declared, as did section 164 of the Civil Code as enacted March 21, 1872, that all property acquired by either husband or wife, or both, during marriage (other than that acquired by gift, bequest, devise or descent), is community property.

In 1889 the legislature of this state amended section 164 of the Civil Code so as to provide that, whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property; that, in case the conveyance is to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the property conveyed to her, as tenant in common unless a different intention is expressed in the instrument and that presumption becomes conclusive in favor of a purchaser or encumbrancer in good faith and for valuable consideration. The courts held that the provisions of said amendment have no application whatsoever to property acquired by a married woman prior to the time said amendment became effective; that said presumption was not created except upon a conveyance of the legal title to real property to the wife; that

such presumption does not exist under a contract to sell and convey in which the wife is named as vendee; and, furthermore, that such presumption does not exist as to a mortgage securing a note payable in whole or in part to a married woman, or as to any other personal property in her possession.

The act of 1850, and likewise section 172 of the Civil Code as adopted in 1872, declared that the husband, not only has the management and control of the community property, but that he has the like absolute power of disposition (other than testamentary) that he has of his separate estate. The legislature of this state for the first time placed a limitation upon the powers of the husband above referred to by an amendment of section 172 of the Civil Code in 1891. This amendment declared in substance that the husband cannot make a gift of community property or convey the same without a valuable consideration unless the wife in writing consents thereto.

In 1917, the legislature placed a further limitation upon the power of the husband to dispose of or encumber community property by the adoption of the provisions of section 172a of the Civil Code. Said section, while providing as before that the husband has the management and control of the community real property, also provides in substance that the wife must join with him in executing any instrument by which such community real property, or any interest therein, is leased for a longer period than one year, or is sold, conveyed or encumbered.

The courts have held that neither the amendment of section 172 of the Civil Code, adopted in 1891, nor the provisions of section 172a, adopted in 1917, has any application to community property acquired prior to the time said respective amendments became effective unless such subsequently acquired property was purchased with community moneys earned prior to the time the same became effective; that community property acquired subsequent to the time the said respective amendments became effective is owned (as under the prior law) only by the husband, and that the wife, during the existence of the marriage, has no right, title or interest in or to such after-acquired community property; that a conveyance of community property, acquired after the amendment of 1891 became effective, by the husband only, un-

supported by a valuable consideration, is not void, but voidable only at the instance of the wife; that a conveyance of community property, acquired after section 172a of the Civil Code became effective, by the husband alone, is not void, but voidable only at the instance of the wife.

Stewart v. Stewart, 72 Cal. Dec. 244; 249 Pac. 197, 199 Cal. 318, and cases cited therein (decided by the Supreme Court in bank on the 2nd day of September, 1926.)

In 1923 the legislature amended section 1401 of the Civil Code so as to provide in substance, first, that, upon the death of either husband or wife intestate one-half of the community property BELONGS to the surviving spouse and the other half GOES to the surviving spouse subject to the provisions of section 1402 of the Civil Code; secondly, that either husband or wife may make testamentary disposition of an undivided one-half in and to the community property. Prior to the time said amendments became effective, it had been the law of this state for many years that the husband had the power to make testamentary disposition of one-half of the community property. However, the said amendments of section 1401 for the first time (except for the brief period of about two years between 1872 and 1874) granted to the wife the power to make testamentary disposition of an undivided one-half interest in and to all of the community property.

The higher courts of this state have not as yet construed said section of the Civil Code as amended in 1923. It is therefore, of course, somewhat perilous to attempt to determine with certainty the meaning and legal effect of said amendment. Reference was apparently made to the said amendment by the Supreme Court in bank in the case of *Stewart v. Stewart*, *supra*. After holding that the wife acquires no interest in community property acquired after 1917 and before 1923, the court said:

"It is not necessary to consider later changes in the law and PARTICULARLY THOSE CHANGES WHICH RELATE TO SUCCESSION."

McKay on the Law of Community Property, Second Edition, published in 1925, speaking of the amendments to sections 1401 and 1402 of the Civil Code adopted in 1923, says:

"This act does not seem to have been intended to change the rule so long recog-

nized in California that the husband is owner during marriage. Indeed the act seems studiously to avoid any radical changes in the former law and to limit its effect to a change of the former rule that on the death of the wife the husband without administration becomes the owner of both moieties of the common property."

The Superior Court of the county of Los Angeles has held that the amendment to section 1401 of the Civil Code in 1923, in so far as said amendment granted to the wife the power to dispose of an undivided one-half of the community property by will, has no application to community real property acquired by the husband prior to the time that the said amendment became effective.

After a careful consideration of that amendment of section 1401 of the Civil Code, adopted in 1923, which relates to succession, I have come to the following conclusions:

(1) That the wife is not vested with any right, title or interest, legal or equitable, in or to community property, real or personal, acquired by the husband subsequent to the time that said amendment became effective and prior to July 29, 1927.

(2) That, as to community property acquired under said amendment and prior to July 29, 1927, the same constitutes a new rule of succession upon the husband's death.

(3) That the said amendment, in so far as it declares in substance that, upon the death of the husband intestate, an undivided one-half of the community property BELONGS to the surviving spouse and the other half GOES to the surviving spouse, merely gives to the surviving wife as heir of the husband all of the community property; that, upon the death of the wife intestate, the husband remains the sole owner of all community property.

(4) That the said section as then amended applies to all community property owned by the husband at the time of his death or at the time of the death of his wife, whenever acquired.

It is important to note that the amendment of section 1401 of the Civil Code now under consideration does not purport to state the respective interests of husband and wife in and to community property DURING THE MARITAL RELATIONS. Such amendment merely declares the status of the title to

community property upon or after the death of either spouse intestate.

(5) The question of the validity of that amendment of section 1401 of the Civil Code which purports to grant to the wife the power to make disposition by will of one-half of the community property (the ownership of which is in the husband) has been much discussed. The argument against the validity of said provision of the section is based upon the theory that the legislature has no power to provide by statute that any person other than the owner of property can dispose of any interest in such property by will. Such an argument, in my opinion, is not sound. The laws relating to marriage, divorce, and the respective rights of husband and wife in and to property acquired by them, or either of them, have been held to be affected with a public interest. Such laws undoubtedly involve the general welfare of the people. Therefore, in my opinion, the Supreme Court of this state in bank will hold that said provision of section 1401 of the Civil Code is a valid, constitutional law, at least in its application to community property acquired after said amendment became effective.

Section 1402 of the Civil Code, as amended in 1923, presents some inconsistencies. Its construction is difficult. The substantive provisions of said section as then amended are as follows:

(a) Community property which passes from the control of the husband by reason of his death or "by virtue of testamentary disposition by the wife" is subject to administration, his debts, family allowance and the charges and expenses of administration. It is important to note that said part of said section as amended provides in substance, that, in the event of the death of the wife testate, devising by will an interest in the community property, the community property as a whole passes from the control of the husband and is as a whole subject to administration, at least so far as it is necessary in order that the community debts may be paid, the family allowance may be made therefrom and the charges and expenses of administration may be paid. Much doubt has been expressed as to whether all of the community property under said conditions would be subject to administration in the estate of the decedent wife, or only half of it, that is, that interest in it (half or less than half) which the wife has devised by her will

It has been held by the Supreme Courts of Washington and Arizona (in which states the wife has power to dispose of half of the community property by her will), that upon the death of the wife testate or intestate as to community property, all of the community property is subject to administration for the purpose of paying community debts.

Ryan v. Ferguson, 3 Wash. 356; 28 Pac. 910. La Tourette v. La Tourette, 15 Ariz. 200; 137 Pac. 426; Ann. Cas. 1915B, 70.

(b) Said section also provides that, in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage, and deal with the community personal property that he had in her lifetime. His possession and control of the community property (says the section) shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. Therefore the question arises: If it be true (as the first part of said section declares in substance) that all of the community property passes from the control of the husband upon the death of the wife testate disposing of one-half of the community property and that the same is subject to administration and the payment of his debts (community debts), family allowance and the charges and expenses of administration, how can the power and dominion of the husband to sell, manage and deal with the community personal property nevertheless exist? Without doubt, the Supreme Court of this state will resolve this question in some effective way so as to give force and effect to each and every one of said provisions of the law. It is possible that the court will hold that the husband retains the said power and dominion over the personal property during administration until it becomes necessary for the court and the executor of the estate to take possession thereof for the purpose of selling the same to pay the community debts, etc., or until it becomes necessary to carry the will of the decedent wife into effect by distributing to the devisees of the wife their share under her will; that, unless one or the other of said conditions exists, the husband has the power to sell and otherwise deal with the community personal property pending administration to the end that a purchaser of personal property taking from the husband in

good faith and for valuable consideration will get a good title to the personal property sold by him.

However, in view of the fact that there is an apparent conflict in the provisions of said section of the Civil Code as to the instant point, one taking the title to a community mortgage, for instance, from the husband during administration in the estate of a wife who has died testate disposing of one-half of the community property, might not be deemed to have acquired a good title to such community property free and clear of administration in the estate of the wife for the purpose of paying community debts. Therefore, such purchaser should not be deemed to have acquired a good title to such community mortgage until he has established his title by judgment quieting title against the executor of the estate and the devisees named in the wife's will. At least this should be the rule unless such mortgage has also been sold to the husband's assignee, for the purpose of paying community debts, etc., during administration under the wife's will.

(c) Said section also declares in substance that, after forty days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property, specifying it, is claimed by another under the wife's will. It would seem that, in the event of the death of the wife, the period of forty days from and after the death constitutes a no-man's land, so to speak. During said period of forty days it is indeed doubtful as to whether or not the wife has died testate disposing of one-half or less of the community property. Such a will may be in existence without notice on the public records either by proceedings to probate the will or by special notice of persons claiming under the wife's will. If such will does in fact exist, certain it is that under the statute, the husband has no power during said forty-day period to dispose of the community real property. If, however, it be a fact that no such will exists, he is the owner of all of the community property and has, of course, full power to dispose of the whole or any part thereof. I am, of course, now speaking of community property acquired after 1923 and prior to July 29, 1927.

However, after forty days have elapsed from the death of the wife, it is, in my opinion, safe to assume that a conveyance of community real property (acquired between said years) made by the husband alone is valid upon the face of the record and that the purchaser taking title from the husband alone in good faith and for a valuable consideration without notice of existence of the wife's will, disposing of one-half or less of the community real property, will be protected and will be held to have acquired a good title to the real property in question. This declaration, however, is subject to the following proviso: IF, AT THE TIME OF SUCH CONVEYANCE, PROCEEDINGS FOR THE PROBATE OF THE WILL OF THE WIFE ARE PENDING IN THE COUNTY WHERE THE PROPERTY IN QUESTION IS SITUATE, SAID WILL SHOWING UPON ITS FACE THAT THE WIFE HAS DEVISED ONE-HALF OR LESS OF THE COMMUNITY PROPERTY, OR SOMEONE CLAIMING UNDER THE WIFE'S WILL HAS RECORDED A NOTICE IN THE COUNTY WHERE THE REAL PROPERTY IN QUESTION IS SITUATE TO THE EFFECT THAT HE CLAIMS AN INTEREST IN THE PROPERTY IN QUESTION, THEN, WITHOUT DOUBT, THE PURCHASER CANNOT BE DEEMED TO HAVE ACQUIRED A GOOD TITLE TO THE PROPERTY.

Some have assumed that section 1402 as thus amended requires the said notice to be recorded within the period of forty days after the death of the wife in order to become effective. The section will not, in my opinion, bear such construction. The notice specified in the act may be recorded at any time, either within the forty-day period or thereafter and, if the deed of the husband is executed at a time subsequent to the recording of such notice, the grantee in the deed will, in my opinion, be deemed to have taken title from the husband subject to the rights of the devisees named in the will of the wife.

I shall make two comments only upon the amendment of 1925 to section 172a of the Civil Code providing that nothing in that section contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property, or any interest therein, between husband and wife.

First: Said amendment applies only to such a conveyance or encumbrance from the husband to his wife as to community real property acquired prior to July 29, 1927. As to such property, it does not apply

to a conveyance from the wife to the husband.

Second: The decision of the Supreme Court in bank in the case of *Stewart v. Stewart (supra)* has rendered that amendment immaterial as to a conveyance of community real property from husband to wife.

I shall now consider the meaning and legal effect of the amendments and new enactments adopted by the legislature of 1927:

Chaptered law 487 constitutes an amendment of section 164 of the Civil Code so as to provide in substance for the first time that, when either real or personal property, or any interest therein, is acquired by a married woman, or when any encumbrance upon personal property or real property is acquired by a married woman by an instrument in writing, the presumption is that the same, or such interest as she acquires, is her separate property; that, if the same is acquired by such married woman and her husband, or by her and any other person, the presumption is that she takes the part acquired by her as tenant in common unless a different intention is expressed in the instrument. Said amendment declares in substance that said presumptions are conclusive in favor of a purchaser, encumbrancer, payee, or any other person dealing with such married woman in good faith and for valuable consideration.

The legal effect of said amendment may best be illustrated as follows: If the record shows the execution of a contract of sale of real property to a married woman, said contract having been executed subsequent to the going into effect of said amendment, the presumption of record is that the vendee's interest under said contract is owned by said married woman as her separate property. If a duly recorded mortgage,

secures a note payable in whole or in part to a married woman, the presumption of record will be that said married woman is the owner of said note and mortgage to the extent of her interest therein as her separate property. These two illustrations are sufficient to indicate the legal effect by presumption of record of the change made by said amendment. Without doubt, the legislature enacted this amendment to overthrow the rule announced by the Supreme Court in the case of *Stafford v. Martinoni*, 192 Cal. 724 (in bank)—1923—and other cases cited therein, to the effect that, if a mortgage appeared of record in the name of the married woman, the presumption is that such mortgage is community property and that her husband is the owner thereof; that, under section 164 of the Civil Code as it now reads, the presumption that property standing in the name of a married woman is her separate property does not arise except upon one transaction only, to-wit: A conveyance of the title to real property to such married woman.

In one of the cases cited by the Supreme Court in the above mentioned case the Supreme Court had held that, when a contract of sale had been executed to a married woman, the presumption is that the vendee's interest under that contract is community property belonging to her husband. The effect of the amendment to said section made by the legislature in 1927 is to radically change the former law by enlarging the scope of the presumptions as above illustrated.

By Chaptered law 488, the legislature of 1927 has amended section 172a of the Civil Code by providing in substance that the wife may join with her husband by and through a duly authorized agent in executing any instrument by which community real property, or any interest therein, is leased for a longer period than one year, or is sold, conveyed or encumbered.

The same expressly grants to the wife the power to join with her husband in the execution of instruments affecting the title to community property or creating an encumbrance thereon by and through her duly appointed attorney in fact (called in the amendment an agent). It may be that she has had that power ever since section 172a was adopted in 1917. There being some doubt as to this, the legislature of 1927 has made it clear that she has that power.

(Continued on Page 26)

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The President's Page

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Los Angeles Bar Association:

ORGANIZATION MEETING—STATE BAR—NOVEMBER 17-18 SAN FRANCISCO

Chief Justice Waste has repeatedly stated that in his opinion "one of the most important steps in the history of the bar of this state is the passage of the statute providing for the incorporation and organization of a self-governing bar for the State of California." The formal organization will take place in San Francisco on the 17th and 18th of next month and every member of the bar who can possibly do so should arrange to be present upon that historic occasion. Why not send a delegation from Los Angeles of two hundred and fifty to three hundred lawyers? If you can go, please notify Mr. Thomas C. Ridgway, State Bar Commissioner and member of incoming Board of Governors, by telephoning TUCKER 2033.

MEETING OF LOS ANGELES BAR ASSOCIATION—TUESDAY NOVEMBER 15th

Owing to the State Bar meeting and the Thanksgiving holidays, it will be necessary for us to advance the date of our next meeting to Tuesday, November 15th.

Very important committee reports are maturing, notably those of the Section on Criminal Law, the Committee on Legal Education and the Committee on Civil Procedure. At this writing I have just come from a meeting with representatives of the Criminal Law Section. There was present an exceptionally able group, consisting of Chairman Walter J. Little, member of the California Legislature; Judge Charles W. Fricke, former Chief Trial Deputy District Attorney, writer and lecturer on criminal law and now on the criminal bench; Judge William Aggeler, formerly Public Defender, now Judge of the Superior Court and criminologist of note; Judge Thomas L. Ambrose, former member of the Legislature and now Judge of the Municipal Court; Percy V. Hammon, former member of the Legislature, Deputy District Attorney and Professor of Criminal Law at University of Southern California; Ivan Kelso, Chief Counsel Automobile Club of Southern California; Thomas P. White,

former Police Judge and now prominent criminal lawyer; Jerry Giesler, prominent criminal lawyer; Miss Caroline Kellogg, Secretary of the committee, sociologist and one of the leading women lawyers of Los Angeles County.

A sub-committee of the Criminal Law Section has formulated a very interesting report which will be published in full in the next issue of the BULLETIN. The substance of this report will furnish the theme for the next meeting which will be a notable and enlightening occasion. The report is unusually progressive in tenor and presages as lively a passage at arms as occurred when several of these gentlemen took part in a discussion before the Association several months ago.

Well known criminologists and sociologists, who are not members of our profession will be invited to be present and participate in the symposium, which will consist of a few concise and authoritative talks upon the various phases of the subject of the report, "Scientific Plan of Social Criminal Procedure."

WORK OF COMMITTEES TO BE MADE EFFECTIVE

In past years many committees have done most faithful work and have submitted reports that should have culminated in valuable contributions to our jurisprudence. The reports were duly filed. Few, however, read them. Many members of committees have suggested a desire to depart from this time honored custom of innocuous desuetude. In each instance where the work of a committee should receive the approval of, or consideration by the Association, I am endeavoring to have the report ready for prompt and definite action by the main body. If legislation is desired and the proposal is in any wise novel, sufficient time prior to a legislative session must be allowed to thoroughly consider and to crystallize the form and substance of the recommendation and to convince the public of its merit. And, too, the entire bar should be given opportunity to participate in the consideration of every problem. Every day at noon, accompanied by my assistant, Mr. Elkins, I am meeting with the chairman and representative members of a committee. The Association may well be proud of the excellent, effective and conscientious work

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of its committees. Please study the report of the Section on Criminal Law and Procedure, which will appear in the next issue of the *BULLETIN*, as well as final reports of other committees as published in succeeding issues.

GOOD WORK, SISTERS!

My idea about women in the profession is that they should not be treated as trick horses in a side show merely because of their sex, nor should we measure their work by any separate and distinctive professional standard. Some women expect and demand odds—others more wise insist upon practicing their profession without favors. I have appointed to committees all of the members of the Association who have offered—over eight hundred up to date. These include a goodly number of women. The services of at least two of these stand out as really notable. For the first time in the history of our organization a woman has held the chairmanship of a committee. Miss Florence Bischoff has presided over the Committee on Legal Education with great ability. As previously reported to you, this committee has conducted surveys of important significance and its recommendations will be well worth the careful atten-

tion of the Board of Governors of the State Bar.

I was really inspired to express myself about the women folks because of the meeting of the Criminal Law Section above referred to. Of this section Miss Caroline Kellogg is Secretary. She has made an earnest, sociological and scientific study of criminology. She submitted to the section a thesis which apparently has secured the almost unanimous approval of her colleagues. With effective aid and collaboration of the many distinguished members of the Section on Criminal Law, we shall have before us a report which will no doubt be the subject of discussion throughout the country.

AGE

No one sex, no one generation, no one particular group can claim the credit for the work of Los Angeles Bar Association. All are making important contributions. It is character, not youth or age, that counts. Idealism, experience, service, progressionism—these are the elements upon which we must build. Not personal aggrandizement, but professional duty, must be the watchword.

(Continued on Page 29)

The State Bar Bill and the Creation of an Esprit de Corps

By MAURICE SAETA of the Bulletin Committee

The heads have been counted, and within a short time the State Bar Act will have become a functioning reality. All lawyers are beginning to realize that a great change is coming, and it is wise and necessary that we adjust ourselves to that forthcoming change. In order to do this properly, we should take an inventory, not only of our profession, but of ourselves. A psychological change should accompany the physical change from a loose, voluntary association to that of a compulsory, regulated organization representing the entire bar of the state. Since we are all going to be under one roof, it behooves each individual to say whether it shall be a heaven or a hell.

This question of the inter-relations of fellow-lawyers becomes a problem which received scant attention under the ancient regime. The lawyer of yesterday on all occasions, stressed the duty to the public generally, and to the client especially. A glance at the Canons of Ethics or the proceedings of the bar associations for the past twenty-five years will show that the problem of the relations between brother-lawyers was either absolutely ignored, or lightly dismissed.

But a shift of emphasis must come in the new regime, and it is necessary and desirable that it should come. The profession of law is peculiarly constituted. Let one lawyer sin, and the whole bar must suffer. The public makes no fine distinctions, but considers the bar as a whole. The delinquency of an attorney is news, and is played up in the newspapers accordingly, at the expense of every lawyer.

The bar having been blamed in the past for the derelictions of its individual members, the bar was compelled to ask for means wherewith to keep its house in order, in order that it might discipline its members quickly and efficiently. The State Bar Bill was the answer.

Under this bill the primary object of the State Bar is to do police duty, but there is, however, an opportunity for bigger and finer work. There is an opportunity now to promote a real esprit de corps among the members, to establish a tradition not unlike that

of the English Inns of Court, that will make members not only proud of the dignity, importance and eminence of the profession, but glad to make sacrifices for it. But one thing is certain, esprit de corps has hitherto been lacking. Different reasons have been assigned for the want of this comradeship. Some have ascribed it to our phenomenal growth in population and wealth, with the resultant influx of a horde of lawyers from all states of the union, lawyers who have been too easily admitted on motion to the bar. Lawyers who were trained under different educational and cultural standards, being far advanced in years, have been unable to unlearn many ways that are foreign to our ideals, with the result that there has been no inner harmony, no common aspiration or ideals. Of course, one would expect, nay demand, of a lawyer, irrespective of his former residence, that he have certain standards of education and culture, and above all things, the makings of a gentleman, but, unfortunately, such has not invariably been the case. Irrespective of the cause, however, lawyers hitherto have not recognized the necessity and the importance of this intangible but nevertheless real something called esprit de corps. The average lawyer has scoffed at the idea as being a superfluity, and has emphasized as the important thing the acquisition of the good-will of the public.

I would have the sincere, honest-minded, but mistaken lawyer listen to the words of the late Judge Shadwood of the Supreme Court of Pennsylvania:

"Nothing, is more certain than that the practitioner will find, in the long run the good opinion of his professional brethren of more importance than that of what is commonly called the public. The foundations of the reputation of every truly great lawyer will be discovered to have been laid here. Sooner or later, the real public—the business men of the community, who have important lawsuits, and are valuable clients—endorse the estimate of a man entertained by his associates of the Bar, unless indeed there be some glaring defect of popular qualities. The com-

munity know that they are better qualified to judge of legal attainments, that they are slow in forming a judgment. The good opinion and confidence of the members of the same profession, like the King's name on the field of battle, is a 'tower of strength'; it is the title of legitimacy."

And if that be not convincing enough, I would recall to his mind recent fresh and vivid personal experiences, viz., the Los Angeles Bar plebiscite for judges, held during the past year, with such marked success when the public, with few dissents, adopted the recommendations of the Bar Association. If this is true in the case of the bench, all the more reason for its being true in the case of the bar. A stream rises no higher than its source, and the reputation of the lawyer rises no higher than the opinion of his bar.

There are two obstacles, however, that have threatened the creation and the fostering of an esprit de corps, which cannot be removed by mere pious wishes or strong gestures. The first obstacle is the lawyer with a "client complex," who takes as the cue for his behavior sentiments expressed by Lord Brougham:

"An advocate in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and cost to other persons, and among them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences: though it should be his unhappy lot to involve his country in confusion."

These were words spoken under special circumstances and in the heat of the moment; words which were questioned then as they are even more so today by the leaders of the bar. Nevertheless, this type of overzealous lawyer stops at nothing; everyone and everything are grist to his mill. He rides rough-shod over his brethren. Insolent, rude and unmannerly, he excuses his conduct, if at all, by alleging the paramount interests of his client. The amenities and the small courtesies that go toward lightening the labors of the day are treated contemptuously by him as trivialities. He ignores telephone calls. He allows brother

attorneys to cool their heels in reception rooms while he is in perpetual conference; refuses to stipulate, when the doing of same would mean little to him, and much to the recipient. He loses himself so completely in his client's cause as to carry on hatreds and animosities long after the case has been settled and dismissed. It is vain to hope to reason with such a person.

The other obstacle is the lawyer who is weak, vacillating and cringing; who abdicates his throne and permits a self-constituted usurper, his client, to occupy it, allowing himself to be used as a tool by an unscrupulous, self-seeking client. Samuel Warren analyzed and dissected for the censure of lawyers of all time this species:

"To you will come panting revenge; merciless cupidity; hard-hearted avarice; hatred, malice, and all uncharitableness. Into your ear will be poured, from time to time, their fierce whisperings against their unfortunate fellow-creatures. To gain their ends, to wound the feelings of an opponent, and secure often some petty advantage, persons employing you will not scruple to violate the sacred confidence of social intercourse; and it will be sought to make you a sure, a willing, and sharp instrument, in their unholy hands, to gratify their evil passions; to sue, for instance, the hasty utterer of slander, the unthinking wrong-doer, with deadly pertinacity, and consequent cruelty to both parties; when a timely, kind, judicious interposition would have healed the skin-deep wound and restored peace and amity. Will you do these things, my friends? Will you consent thus to demean yourselves, and degrade your office? Nay, but God forbid! You shall, on the contrary, throughout life, remember from whose awful lips fell the words, 'Blessed are the peacemakers!' You shall say on such occasions, with noble firmness, 'I will not do what you demand. I disdain to be the instrument of your vindictiveness, of your over-reaching avarice; I will not be the conduit-pipe of your sweltering venom and malignity. I will not, at your bidding plunge your debtor into prison, and his family into the poor-house.'

I will not hurry into the Gazette one struggling manfully but desperately with misfortune, and whom you would prostrate with short-sighted fury. I will not do all this, when I am satisfied that they are unfortunate only, and you cruel and

exacting. If you want to crush and to destroy, go elsewhere! I will not abuse the law; I will not plunge its sharp weapons into their hearts, nor prostitute law, in my person, by giving effect to your unjust and tyrannical wishes!"

This type of client, unfortunately, still flourishes today, and although the State Bar will protect the public from the unscrupulous lawyer, we have no organization that will protect us from such clients. The emphasis has always been upon the duty owed to the client, but nothing has ever been said of the duty owed by clients to lawyers, and I would mention one duty that should be indelibly impressed upon the mind of each client; viz., "Thou shalt not sow dissension in the ranks of brother lawyers."

Through their tools, the weak lawyers, such clients have made onslaughts upon the integrity and harmony of the bar. We can, however, protect ourselves against these onslaughts through the medium of the State Bar. Mere voluntary fraternal committees are not sufficient to cope with the situation. More drastic remedies should be employed. A code of conduct should be formulated at the same time as the require-

ments for admission to the bar are formulated, that will fix minimum standards of decency and good-will between brother lawyers. No attempt will be made to change human nature, but efforts can and should be directed to control and restrain the excesses of the types of lawyers that I have above described.

The Canons of Ethics came into existence because it was felt that there were certain lawyers that could not be depended upon to deal justly with the bench, and with the client. Just so, I maintain that this code of conduct is necessary for the uncultured, uneducated and unprincipled lawyer with a "client complex," whose behavior toward his fellow attorneys is no different from that of the proverbial bull in the china shop.

In pleading for such a code of conduct, I am not unmindful of those lawyers, and their name is legion, who are inspired to live and to work by higher and nobler ideals; who need no code to guide them in their conduct; who "delight in the law and are glad to serve her"; who feel themselves instruments in the furtherance of one of the greatest of human institutions, JUSTICE.

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Sidelights on the Buffalo Meeting

By JUSTIN MILLER, *Dean of the University of Southern California Law School*

The headquarters of the American Bar Association in Buffalo were at the Statler Hotel and at that place most of the meetings were held. Some of the larger meetings were held at the Buffalo Consistory, which is located approximately a mile from the hotel, the intervening distance being covered by automobile along a beautiful tree-lined residence street. Although enough rain fell during the Convention days to make it seem homelike for the easterners and middle westerners, the members were not seriously inconvenienced even on their occasional journeys between meeting places.

One of the most interesting phases of the meeting was the group of presiding officers at the various meetings. This group included Governor Whitman, the retiring President, who demonstrated the forcefulness and strength of character which distinguished him in his earlier days as District Attorney and later as Governor of New York. Probably the man who seemed most thoroughly equipped for the work of a presiding officer was John W. Davis, a former President of the Association and the Democratic candidate for the Presidency in 1924. R. E. L. Saner, also a former President, was in charge of one of the meetings, and Senator Chester I. Long, last year's President, was in charge of one important morning meeting when his capacity as a forceful master of ceremonies was very much needed. That was the morning on which the report of the Committee on Legal Education was called for and reference will be made again to this incident. At the evening meeting, at which Lord Chief Justice Hewart delivered the main address, the members were privileged to have as their presiding officer Chief Justice William H. Taft of the United States Supreme Court. The Chief Justice had come from a sick bed for the occasion and it was apparent that he was not in his usual good health and spirits. Only once during the course of the evening were we privileged to see the famous Taft chuckle working its way up from the lower regions, perfectly timed for the utterance which gave it point. During the closing day of the meeting Silas H. Strawn, the newly elected President, presided. This is truly

a remarkable group of men and suggests the leadership which has made the American Bar Association the great organization which it is.

There were so many interesting events during the course of the Convention that it is hard to select the outstanding ones. However, the following are typical and represent some of the high points of a program which was so full that it was impossible for any one present to see or to hear any substantial part of it. One afternoon when the reports seemed to have become particularly dull and uninteresting, an intermission was taken for the presentation to the Association of a gold band placed around the President's gavel. The band was the gift of the members of the Colorado bar. The presentation speech was made by James G. Rogers, President of the Colorado Bar Association. Mr. Rogers explained that the gavel, which in its origin was a carpenter's mallet, had been purchased at the first meeting of the Association fifty years ago; that twenty-five years ago the Colorado Bar Association had covered the head of the mallet with silver taken from the mines of that state, and that on this, its fiftieth anniversary, the Colorado Bar presented the gavel again to the Association, this time with a gold band made from a nugget taken from one of the earliest of "diggins" in the state of Colorado. The presentation speech was brief but delightfully phrased in most happy language and came in very pleasant contrast to the proceedings which had gone before. John W. Davis was the presiding officer upon this occasion and with all the grace which is characteristic of him in his public appearances he responded in equally pleasant vein saying, in effect, that the history of the gavel was the history of the Association, in its earlier days representing a poor struggling body, going then on through its silver days of increasing prosperity, and finally arriving at the golden age of established success and outstanding accomplishment.

Another interesting event occurred at the session when Moorfield Story presented to the Association Francis Rawle, one of the two surviving charter members of the Asso-

ciation. Mr. Story himself gave a much greater appearance of age than did Mr. Rawle, who might well have passed for one of the younger members of the Association. Both men, however, were representatives of the old school and addressed the Association in reminiscent vein of the earlier days and the great men who occupied the stage at that time.

At the same session an unexpected incident occurred when a number of amendments to the Constitution were proposed for adoption. One of them was designed to prevent any person from holding the office of Secretary or Treasurer consecutively for more than three years. The amendment seemed innocuous and no one seemed to expect serious opposition upon it. During his remarks, however, Mr. Rawle had taken occasion to say that he had served for a number of years as Secretary and had advised against the adoption of the amendment. Spirited opposition arose from the floor and the amendment was defeated decisively.

Perhaps the most spirited occurrence of the whole session took place on Thursday morning of the meeting when the report of the Section on Legal Education was called for. Silas H. Strawn, as chairman of the Committee, explained that the Section had not yet had a meeting, that a dinner meeting was to be held on Thursday evening and asked that the report of the Committee be deferred until Friday morning. Two or three orators demanded an immediate report from the Committee and protested what was claimed to be underhand methods in preventing a free and fair discussion of the work and policies of the Section. Senator Long, as the presiding officer, displayed rare ability in repeatedly calling the gentlemen to order, advising them that matters which they wished to discuss were matters which should properly be brought up in the Section meeting and that they could not be considered at the general session. After Mr. Strawn had explained that the dinner meeting would be open to all and that full opportunity would be given for discussion of all questions, the chairman was able to induce the insurrectionists to refrain from further interruptions. The result of the altercation was to swell the sale of tickets for the dinner, and it became necessary to move it from one of the small rooms to the grill room in the

basement of the hotel. A large crowd gathered for the dinner in eager anticipation of what promised to be the best battle of the meeting. What was their chagrin to be advised by the chairman that the opposing factions had adjusted their difficulties, and that all those who wished to see a fight might go to Chicago for the Dempsey-Tunney battle. The meeting then turned into a love feast, the Section quickly adopted a resolution which satisfied the insurrectionists, and a benediction was finally pronounced by J. Hamilton Lewis which closed a meeting remarkable for its perfect harmony and accord.

It would be futile to attempt in this brief review to discuss upon their merits any of the many questions presented to the meeting. The program will reveal the general nature of the addresses delivered both at the general meetings and at the section meetings. Perhaps the two outstanding addresses were those delivered by President Whitman and by Lord Chief Justice Hewart of England. Governor Whitman's address consisted of a general review of the activities of the Association during the past year, stressing particularly the necessity for increased assumption of responsibility and leadership upon the part of the members of the Bar in solving the many problems now facing the country in connection with the administration of justice. Lord Hewart discussed the common background of England and America in their laws, their social customs, and their intellectual points of view. He emphasized particularly the danger to democracy which is involved in a growing tendency toward bureaucracy in government and from a commercialized press. Although he spoke in terms of conditions existing in England, Chief Justice Taft in closing the meeting stated that the problems which he had mentioned were equally present and equally vital in America.

A more intimate view of the Lord Chief Justice was had by those members who attended a garden party given by the Saturn Club at its club house and gardens during one of the afternoons of the meeting. At this party Lord Hewart was "chaired" in a chair which is never used by anyone but the Dean of the club or by distinguished visitors, such as Lord Hewart. Preceding the "chairing" Lord Hewart received the members of the Association. As the line

(Continued on Page 28)

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Do We Coddle The Criminal ?

By CARL L. MAY, *Supervisor Adult Probation Department
Los Angeles County*

The question of enforcing and maintaining our laws, as well as punishing those who violate them, is of moment not only to law enforcement officers, the judiciary and attorneys, but to the general public as well.

Many discussions of the crime problem would lead one to believe that most offenders are being leniently dealt with by the courts, and that this state of affairs is the cause for the present disrespect shown for our laws.

This leads us to the question, "Are we coddling the criminals to such an extent that we are encouraging them to continue in their criminal paths?" If this is so, the public would have reason to demand a change in the administration of justice. It is only too true that the average citizen has the impression that the criminals are being released on probation in large numbers, and that as long as this practice continues, crime will increase.

Statistics do not bear out this erroneous idea concerning probation. Of five hundred recent cases handled by the Adult Probation Office, sixty-one percent were denied probation, four percent were otherwise disposed of, while only thirty-five percent received probation. The men placed on probation served from four months to one year each in the county jail while awaiting hearing in the superior court, and in many cases they were either fined or were ordered to reimburse those whom they had defrauded. It is worthy of note that according to the Probation Office's record for 1926, \$23,932.00 was paid through the Probation Department by those placed on probation who were ordered by the court to pay fines or reimburse those they had defrauded.

During the year 1926, seventy-seven percent of those previously placed on probation were dismissed, having complied in full with the orders of the court and probation officer, while nine percent were punished for violation of their probation. The remainder deserted, and, although the Identification Bureau records have been closely watched, few cases were found where these men have reverted to crime

again. In all cases of desertion the court issues a bench warrant and in the event the deserter is later arrested or located he is again brought before the court on a violation of probation charge.

If a man has been arrested for the first time, or as some people term it, "first time caught," this is no reason in itself why he should be granted probation. If this were true, approximately seventy-five percent of those applying for probation would be entitled to leniency.

The fact that every man that requests probation must stand on his own rights and not know until the time the judge passes sentence, that he is to be granted leniency, is in itself a strong point revealing the fact that probation can never be promised but it must be earned.

Many newspapers, as well as the average citizen, fail to distinguish between parole and probation. Those on parole are men who have received sentence and have served time in jail, a reformatory or state prison. Those on probation are men who have not been sentenced to an institution, or whose sentences have been suspended, and who have been released on what might be called their good behavior for a certain period. Under a recent ruling of the State Board of Prison Directors it was resolved "that prisoners who, before entering either San Quentin or Folsom prisons, had violated probation or who, having been granted parole, violated same, shall not hereafter apply for parole."

Under the 1927 amendment to section 1203 of the Penal Code (Probation Law), the court is allowed considerable latitude in all probation matters: "The court, judge or justice, in the order granting probation and as a condition thereof, may imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law in the instant case; may fine the defendant in such sum not to exceed the maximum fine provided by law in such case; or may in connection with granting probation, impose either imprisonment in the county jail or fine or both—and may require bonds for the faithful observance and perform-

ance of any or all of the conditions of probation."

Under the old statute as it stood prior to 1927, the court, in compliance with Penal Code, sec. 1191, after a plea of guilty, or verdict of guilty, appointed a time for pronouncing judgment not less than two days or more than five days. Where the defendant applied for probation it extended the time twenty days (Penal Code, sec. 1203) with further right upon the part of the defendant to request an additional extension of time to not more than ninety days. Thus the court had power under the law to incarcereate the defendant requesting probation not more than one hundred and fifteen days, at the end of which time sentence would have to be pronounced to retain jurisdiction.

Under the present law, the courts have power to compel a probation applicant to serve all or part of his probation period in the county jail, or upon the public highways under the control of the sheriff.

Other sound aspects of the new legislation contained in this section are that probation shall not be granted to any defendant who was armed with a deadly weapon at the time of the perpetration of the crime or at the time of his arrest, nor to one who inflicted great bodily injury or torture in the perpetration of the crime, nor to a defendant previously convicted of a felony.

It is true that the United States leads the world in the number of crimes committed, but the source of this situation must be traced to causes other than the adoption of the probation law and other humane statutes. The evil of wide-spread crime will continue as long as the so-called "law-abiding citizen" treats this deplorable condition as a matter of course, or because of ignorance, carelessness or neglect, does not fulfill his duty as a citizen in helping curb the evil.

If crime is to decrease the people must stand firmly for law and order, and endeavor to assist in its enforcement. This can only be done by cooperation of the citizens with the police and other organizations working for the prevention of crime.

Experience has taught us our most efficient prevention remedy may be summed up in the word, education. The coming generations, as well as the present should be taught that our laws must be respected

and obeyed. Sixteen percent of those tried in the local criminal courts have no education, fifty-seven percent, only grammar school training or part of the same, and only twenty-one percent enter High School. This leaves only six percent of those handled as having had part of or a complete college education. These figures indicate that those interested in crime suppression could, with profitable results, bend efforts in furthering the education of our young people.

To be sure, there are causes and reasons for crime other than want of education, and there is a need for the spending of additional time and research in ferreting out and attempting to remove these causes, with the view of preventing the adoption of criminal careers. But we must not lose sight of the necessity of rehabilitating those who have already been found guilty of crime. For rehabilitation serves as a check on the repetition of wrong-doing. When one is deprived of his liberty by the state, it is no more than fair to that person, if he is in need of it, that he be educated, and if possible taught a vocation or trade while in confinement at prison, instead of being released with \$5.00 cash, a suit of clothes and the best wishes of those who sent him to the institution.

Similarly, it is a wise policy to have a beneficent system for dealing with those who, although convicted, have made an adequate showing that, given a new start in life and proper supervision, they will probably not again be guilty of crime.

In this field, the probation department finds its work.

Los Angeles County may well feel proud of its judiciary. The efficiency of our system of dealing with crime is greatly aided by the high type of judges found not only in the superior courts, but in the municipal and justices' courts. These latter courts are the ones which first hear all the evidence in cases and decide whether or not they are ones which should be tried. Many cases are thus eliminated through these lower courts, which, if sent to the superior courts would only serve to congest them, and which, due to lack of evidence, are not proper cases for jury trials. The repeated exercise of sound discretion by our judges in granting or refusing probation affords

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Doings of the Committees

OPINIONS BY COMMITTEE ON LEGAL ETHICS

W. JOSEPH FORD, *Chairman*

GURNEY E. NEWLIN THEODORE T. HULL

JOHN O'MELVENY JOHN BIBY

36. DUTY OF LAWYER TO OPPOSING COUNSEL—

CANDOR AND FAIRNESS—

PREPARATION OF REFEREE'S REPORT WITHOUT KNOWLEDGE OF OPPOSING COUNSEL.

The opinion of the Committee has been requested concerning the following inquiry:

Where a referee (a layman) has been appointed, not to try the issues and report a finding and judgment, but to take an account before judgment, or to ascertain any other fact or facts in issue, to enable the court to determine an action, is it proper for counsel for one of the parties (acting alone in the matter and without the knowledge or consent of opposing counsel) to prepare the report for the referee, after the taking of the evidence has been completed and the matter submitted on briefs?

In connection with such inquiry, attention is called to the analogy in the practice before courts of having the findings and conclusions of the court prepared by counsel for the prevailing party, instead of by the trial judge.

Canon 22 of Canons of the American Bar Association, among other things, contains the following statement:

"The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness, and further it is unprofessional and dishonorable to deal other than candidly with the facts in taking a statement of witnesses, in drawing affidavits and other documents and in the presentation of causes."

The Supreme Court of Georgia, in the case of *Burley v. State*, 124 S.E., page 536, in the course of its opinion, after quoting the above provisions of the canon, stated:

"The administration of justice is not a game of shrewd or mystifying decep-

tions or camouflaged manoeuvres."

The course of conduct referred to is, in the opinion of the Committee, unethical and improper and does not conform to the standard of candor and fairness as is required by the canon and is practiced by those lawyers who conform to the highest standards of the profession. The referee, being a layman, is not skilled in the preparation of what are in effect "findings," nor in the use of legal language. The report as prepared by counsel might have a slightly different meaning through the use of technical terms than that intended by the referee. The report, under such circumstances, would not be the referee's report but would instead be the attorney's conception of such report. It would be submitted to the court and opposing counsel as the report of the referee which would not be in fact true. The preparation of such report without the knowledge of opposing counsel would not be fair conduct to either the court or such counsel.

Dated: October 6, 1927.

37. ADVERTISEMENT:

(a) **IS AN ATTORNEY ENTITLED TO INSERT IN A TRADE JOURNAL A BUSINESS CARD CONTAINING HIS NAME, PROFESSION, OFFICE ADDRESS AND TELEPHONE NUMBER?**

(b) **IN SO-CALLED SPECIAL OR FEATURE EDITIONS OF OUR NEWSPAPERS?**

(a) The publication of ordinary simple business cards being a matter of personal taste or local custom is not *per se* improper. Considering the customs and conditions prevailing in Los Angeles, the Ethics Committee of the Los Angeles Bar Association has heretofore expressed the opinion that the insertion by lawyers of business cards in newspapers, is improper.

(b) Eulogistic articles, including a general description of the character of practice in which an attorney is engaged, published in a special annual edition of a newspaper intended as an advertisement of the business and resources of the territory in which the newspaper circulates, violates the canons of legal ethics. It exhibits bad taste and tends to bring the profession into more or less disrepute.

The General Council of the English Bar

condemns the practice of the English bar who cause their names and London addresses to be published in a legal directory published in America, on the ground that an English barrister should not advertise.

Dated: October 6, 1927.

COMMITTEE ON LEGAL EDUCATION

The Committee on Legal Education met at luncheon at the Artland Club on Tuesday, October 11, at which meeting the sub-committee on the investigation of the attendance, requirements for admission, and the courses of study of the law schools of Los Angeles announced that in addition to the report as to the number of persons studying law in the institutions in this city (which report has been published in an earlier issue of the BULLETIN),

the sub-committee is assembling data from various sources in order to make a complete history of legal education in Los Angeles from the earliest beginnings, when groups of students met together for mutual help and guidance, to the present day of well-equipped law schools. It is hoped that the attorneys and judges who have recollection of those early days of legal education in this city will give the committee the benefit of their reminiscences.

The questionnaire blanks sent out to the members of the Bar Association has been returned in gratifying numbers. The clerical work of statistising the results is laborious, but it is hoped that the report of the committee on the questionnaire will be ready for publication in the near future.

Respectfully submitted,
FLORENCE M. BISCHOFF,
Chairman.

ATTORNEYS RETURN FROM CHINA

In this edition there is an announcement of the formation of a partnership between Frank W. Hadley and Herbert Ralph Snyder who have opened law offices in the Taft Building in Hollywood. These men have returned to the United States after many years of active practice in Shanghai, China. Mr. Hadley studied Chinese while at the University of California and followed in the footsteps of Thomas Haskins and Julean Arnold, also University of California men, entering the American Consular Service in the Far East as a student interpreter. Mr. Hadley was stationed in the American Embassy at Tokyo, the Legation at Peking and the Consulates at Tientsin and Shanghai. He was associated with that unique tribunal, The Shanghai Mixed Court, from 1909 to the end of 1926 as Assessor and Attorney and saw many changes, including the Revolution of 1911 when the Manchus were overthrown and a republic established, the unsuccessful "revolution" of 1913, the weakening of foreign control around the time of the Lin-cheng Bandit Raid in 1924, the rise of the Soviet influence culminating in the Shanghai Riots of May 30th, 1925, and the relinquishment of the foreign consular control over the Mixed Court at the end of 1926.

Mr. Snyder was a member of the firm Fessenden, Holcomb & Snyder of Shanghai, China, which firm numbered among their clients The Standard Oil Co. of N. Y., The Texas Co., The U. S. Steel, E. I. Dupont De Nemours & Co., The Robert Dollar Co., The Dollar Steamship Lines, The Admiral Line, The United States Shipping Board and Emergency Fleet Corporation and the U. S. P. & I. Association.

Both Mr. Hadley and Mr. Snyder have had extensive experience in the extraterritorial courts of China and have appeared in the American, British, Japanese, Portuguese, Spanish, Italian, Danish, Brazilian, Chinese and Mixed Courts.

It is interesting to note the progress of Chinese law from the common law of the Manchu Dynasty, as set forth in the Ching Code, to its present status with its numerous codes copied mostly from the Japanese and German codes and influenced by the laws of the United States and Great Britain. The first among these codes, the Criminal Code, the Civil Code and the Code of Civil Procedure, have been used as guides rather than promulgated law since 1911 and, since the recent agitation by the Chinese for equal treaties, there has been a flood of codes covering most phases of modern western law and designed to bring about the abolition of extraterritoriality and to impress the western nations with the idea that the Chinese are fit to govern the foreigners in China.

Case Notes

EVIDENCE-HEARSAY—ON CROSS EXAMINATION

In the case of *Young v. Vallejo Electric Light and Power Company*, decided in the Third Appellate District, September 29, 1927 and reported in 54 C. A. D. 328, an interesting anomaly is presented. It was essential to the case on the part of the plaintiff that notice to the defendant that certain electric wires were dragging on plaintiff's house be shown. On cross examination of one of plaintiff's witnesses the defendant brought out that plaintiff had stated to the witness that notice had been given to the defendant some six months before. *Held*: "This hearsay evidence, introduced by the defendant, although it would have been an error to admit it over objection, is sufficient to establish the fact that the defendant had notice of the position of the wires at the time stated." The Court seems to place itself in the curious position of admitting that the evidence was incompetent and in the next breath using that very evidence to support the verdict.

Several reasons are assigned as the basis of the hearsay rule: First, that the evidence is not given under the oath of the person making the statement; Second, that to admit hearsay would greatly increase the amount of evidence and make trials never-ending; Third, that there is no opportunity to cross examine the person making the statement; Fourth, the greatly increased opportunity for fraud and perjury; and various other minor reasons. None of the decisions or texts seem to directly state that which this writer believes to be the real reason for the hearsay rule; to wit, that by common experience each and every one of us knows that hearsay is thoroughly unreliable and not to be believed in the majority of instances. With this in mind it would seem that such evidence should always be taken with the proverbial grain of salt. The court seems, however, to have been well within its decisions in accepting the hearsay for face value once it was admitted without objection. *Lucy v. Davis*, 163 Cal. 611.

The peculiar thing is that in this case the defendant, who was cross-examining, apparently could not object to the testimony as hearsay, he having brought it forth by his own questions. *Estate of Schulmeyer*, 171 Cal. 340. And undoubtedly the plaintiff did not desire to make objection. The ultimate result was to leave the defendant holding the sack with evidence in the record, plainly incompetent, to which he could not object and which could be used against him. This latter phase of the case is a fine illustration of what a delightful hornet's nest cross-examination may be for the attorney who does not carefully conduct that cross-examination.

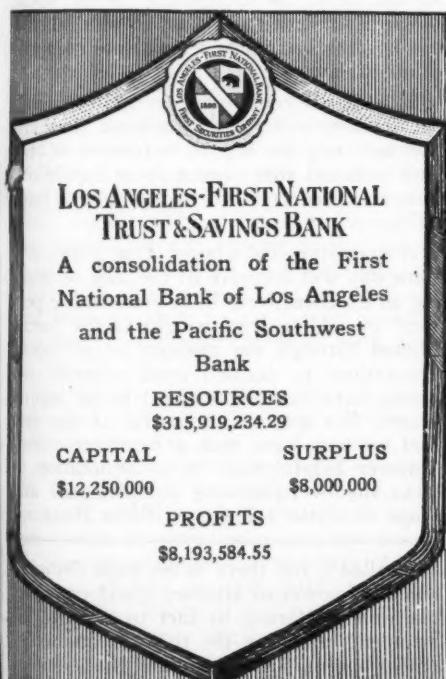
DELMAR W. DODDRIDGE.

DO WE CODDLER THE CRIMINAL?

(Continued from Page 22)

happy assurance that this power vested in them is not being abused.

It is apparent from the foregoing facts that probation as it is meted out by the criminal courts is a leading factor in the rehabilitation of the criminal rather than an inducement to the criminally inclined to revert to crime.



Book Reviews

By HARRY GRAHAM BALTER of the Los Angeles Bar
Lecturer in Law at the College of Law, Southwestern University

CUTLER'S TIFFANY'S FORM BOOK; By Frank B. Tiffany, 2nd edition by Wm. W. Cutler; 1927; VIII and 2,272 pages; Price \$20.00; Vernon Law Book Co., Kansas City, Mo., West Publishing Co., St. Paul, Minn.

And still another form book on the market!

It is only fair to say at the start—in order to justify the reader to continue this review after reading the first uninviting sentence—that Cutler's Tiffany is not just another ordinary form book. Even the most impartial observer cannot help but remark that the book is unusually desirable.

The original Tiffany, published in 1915, has long been recognized as a standard book of general legal and business forms. The second edition of Mr. Cutler will no doubt serve to again place the work before the profession as an outstanding book of forms.

The seventy chapters bring out not only the stereotyped forms found in every book of forms, but disclose hundreds of forms never before found in a general book of legal forms.

Especially welcome are numerous forms dealing with Automobiles, Aviation, Bankruptcy, Massachusetts Trusts, Department Store Contracts, Exhibitions, Extradition, Federal Reserve Banks, Public Utilities and Theatres. The chapter on corporations alone contains over three hundred useful forms.

Nor is this unusual diversity of forms covering different fields of law, entirely surprising, because a form book in this day and hour, if it is to serve as a real aid, must keep abreast of the development of new fields of law.

The aim of Mr. Cutler has been to include not only the generally accepted forms of the various classes, but to give also, unusual agreements and forms, and wherever

necessary, special clauses and provisions. This aim is laudable and has been well carried out.

It might be useful to add herein, a word of advice which was indicated by Mr. Tiffany himself in his preface to his first edition. "Except in the case of the same stereotyped forms like deeds, a form or precedent can seldom be used as a whole, but serves rather by way of suggestion of matters which it may be desirable to cover, and as a repository from which the draftsman may draw, and a number of forms relating to one subject may thus contribute to the desired end."

At the beginning of each chapter wherein are grouped a set of forms covering a particular subject matter, the author has in a "note" set out in brief a statement of the meaning or importance of various legal instruments, often citing code sections from various state codes. This is helpful, but should never be completely relied upon. What is intended only as a guide should not be snatched up as a complete compendium of law.

Much space could be taken up illustrating the diversity of scope of the work. Perhaps the rest can be left to inference if the fact is stated that even a form for "For auto rental contract" is to be found. (Page 237).

A suggestion and a hope: That somebody, some day will conceive of the idea of making an excellent form book even "more perfect" by adding legal weight to the forms offered through the medium of including annotations to decided cases wherein the forms have been determined to be legally sound. We are not unmindful of the fact that we now have such a form book—but however helpful may be its annotation, it lacks the overwhelming completeness and scope of *Cutler's Tiffany's Form Book*.

COMMUNITY PROPERTY PROBLEM

(Continued from Page 10)

by expressly granting it to her by said amendment. However, it must not be assumed that a general power of attorney

(so-called), for there is no such thing as a general power of attorney), will empower the wife's attorney in fact to execute instruments affecting the title to community real property. In my opinion, the so-called general power of attorney, when executed

by a married woman, must be construed to authorize the appointed agent of the wife to convey or encumber her separate property only. It is not safe to assume that a power of attorney executed by a married woman grants sufficient authority to the attorney in fact therein named to execute any instrument affecting the title to community property unless the same expressly describes the community property in question, or at least, in express terms endows the attorney in fact therein named with power to join, for and in her behalf and in her name, with her husband in the execution of instruments for the purpose of conveying or encumbering, as the case may be, community real property.

The most important and far-reaching change made in the community property laws of this state for many years is inherent in Chaptered law 265. The same adds a new section to the Civil Code, to be known as section 161a. It defines the respective interests of husband and wife in community property, both real and personal. The definition reads as follows:

"The respective interests of the husband and wife in community property during continuance of the marriage relation are PRESENT, EXISTING and EQUAL INTERESTS under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code."

In my opinion, the courts will hold that said new law has no application to community property acquired prior to the time said law became effective, to-wit: July 29, 1927. In accordance with the principle of law announced and applied in the case of *Roberts v. Wehmeyer*, 191 Cal. 601, the courts will also probably hold that said new law does not apply to community property acquired by community earnings made prior to July 29, 1927.

The courts of this state have held for many years in many decisions culminating in the recent decision of the Supreme Court in bank, in the case of *Stewart v. Stewart*, 199 Cal. 318, 249 Pac. 197 (in bank, September 2, 1926), that the husband is the sole owner of community property during the marital relations; that the wife, during said period, has no right, title or interest therein. The courts of this state have even gone so far as to declare that, upon the execution and delivery of a deed prior to 1889, purporting to convey community real

property to a married woman, the whole title, both legal and equitable, in and to the property described in said deed, becomes vested in the husband by means of the deed to the wife. It is evident that it was the intention of the legislature in enacting said new law to radically change the former rule of law as to the interests of the wife in and to community property acquired on or after July 29, 1927. The law declares that the interests of the husband and wife in and to such property are equal interests and that the interests of both husband and wife are, not only equal interests, but they are present and existing interests.

It is impossible, of course, in advance of a construction of said new law by the Supreme Court of this state in bank to construe the meaning and legal effect of said new law conclusively. I have considered the meaning and legal effect of said new enactment under the light of all of the code provisions of this state relating to community property as they have read since July 29, 1927, and also under the light of many decisions of the courts of this state and of other community property states. Without citing many authorities, I shall state my conclusions.

The first question that arises is this: What is the nature, extent and quality of the wife's interest as to after-acquired community property?

There have been prior hereto two theories of law respecting this question in other community property states in which the law gives the wife a vested interest in such property during the marital existence.

The first theory is that both the legal and equitable title to all community property is vested, share and share alike, in husband and wife. Such is the rule in the following states: Idaho, New Mexico, Nevada, Arizona and Washington.

The second theory is that of the state of Texas. The courts of that state hold that the legal title to all community property vests in the person (husband or wife, as the case may be) to whom the same is conveyed, assigned or transferred. Under said rule, the grantee, in case of conveyance of real property to either husband or wife, is deemed to hold the legal title to one-half interest therein for him or herself, as the case may be, and to hold the remaining undivided one-half interest in such

property in trust for the other spouse, the interest of such other spouse being that of equitable owner of said undivided one-half. This rule is the minority rule. Community property states other than said states have not as yet made any definite ruling as to vesting of title.

In view of the fact that the California courts have repudiated the doctrine of the Texas courts in those cases above referred to holding that, upon conveyance prior to 1889 of community real property to a married woman, the legal title immediately vests in

the husband, and the husband alone, it is quite possible that our courts will hold that the legal and equitable title to all community property acquired by a married man on or after July 29, 1927, is vested as to one-half interest therein in the husband and, as to the remaining undivided one-half interest therein, in the wife. It would seem certain that the wife will be deemed to be either the legal owner or the equitable owner of an undivided one-half interest in and to such property.

(To be Concluded)

BUFFALO MEETING

(Continued from Page 18)

passed by, each member striving to make some comment which would provoke an interesting reply from the somewhat bored Lord Chief Justice, Mr. Kemper Campbell, President of the Los Angeles Bar, approached and casually mentioned that he resided in Hollywood. At once a gleam of interest appeared in the eyes of the distinguished visitor and a smile broke over his features. In a most animated manner he began to ask questions concerning the movie actresses and the possibilities of playing golf with Charlie Chaplin.

Many interesting meetings were held by subsidiary or collateral organizations. Luncheons and dinners were held by legal fraternities and sororities and alumni groups from the various Law Schools. At

one of these Dean Pound and Samuel Williston spoke concerning the development of Harvard Law School. At a breakfast of the Phi Delta legal sorority, presided over by Mabel Willebrandt, the distinguished member of the Los Angeles Bar, a number of well known guests were introduced to the women members of the legal profession. Sessions were held by the Association of Attorney Generals, the Commissioners on Uniform State Laws, the Conference of Bar Association delegates and the Comparative Law Bureau. A report was also made by Dr. William Draper Lewis on the work of the American Law Institute.

The most outstanding impression which was made by the whole meeting was that the American Bar Association has grown into a tremendous organization operating efficiently and well calculated to advance the ideals of the legal profession.

COMMUNITY CHEST

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PRESIDENT'S PAGE

(Continued from Page 13)

CIVIL PROCEDURE

One of the elder and much-respected members to whom, by the freedom of this column, I am privileged to pay tribute, is our good old friend, Judge Waldo of Pasadena who heads the Section on Civil Procedure. The judge is a dynamo of energy and has a thoroughly fearless and progressive outlook. He has appointed sub-committees to report upon the various phases of practice covering the entire code. The sub-chairmen are: Edward Winterer, Charles W. Cradick, Judge Emmett H. Wilson, Judge Morgan Galbreth, Harold S. Kiggens, Lloyd O. Miller, W. T. Craig, Robert A. Waring and Frank M. Porter. We expect to devote a meeting of the Association to the results of their excellent work. Among other events, a debate will be held upon the proposal to confer the rule-making power upon the Supreme Court, eventually superseding the Code of Civil Procedure. It is

urged by its proponents that this method will simplify the practice and will bring our procedure more in line with methods used successfully in other countries.

AFFILIATED ORGANIZATIONS

Live local bar associations affiliated with our own are operating in Pasadena, Long Beach, Alhambra, San Fernando Valley, Inglewood, Huntington Park and San Pedro. I recently had the pleasure of being a guest of the Alhambra Association. I was really astonished at the large attendance and the spirit and enthusiasm that prevailed. This organization has determined to invite to its monthly meetings community leaders outside of the legal profession, including ministers (but not too many, they said), merchants, doctors, bankers, educators, builders and other representative citizens, in order that the public may become informed concerning the ideals, ethics and the constructive purposes of the lawyer.

More power to our local bar associations.

KEMPER CAMPBELL.

CHOOSING A "CORPORATE" EXECUTOR OR TRUSTEE

In the selection, for a client, of a corporate Executor or Trustee a conscientious attorney will consider the general reputation of the proposed trustee both as to safety, and as to net return secured for trusts. And also as to its general attitude toward beneficiaries, in kindness and consideration.

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NOVEMBER 15, 1927

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